

Tuesday, June 5.

OUTER HOUSE.

[Lord Kincairney.]

FORBES v. FORBES.

*Husband and Wife—Divorce—Desertion—Conditional Offer by Defender to Resume Cohabitation—Reasonable Refusal by Pursuer—Conjugal Rights Act 1861 (24 and 25 Vict. c. 86), sec. 11.*

A wife who had deserted her husband, and had continued in her desertion for 20 years offered to resume cohabitation, but refused when asked to give any explanation as to her mode of life during her absence. *Held* that the wife's offer, being in effect made subject to the condition that she was not to give any such explanation, was not such an offer to adhere as the husband could be reasonably expected to accept, and that it did not form a defence to an action of divorce for desertion at his instance.

This was an action of divorce by a husband against a wife for desertion. The facts, so far as material, are fully set forth in the opinion of the Lord Ordinary.

*Opinion.*—"This is a case which appears to me difficult, and also important in regard to the law of divorce for desertion. It is undefended, and I cannot say what my judgment might have been had the defender appeared and resisted the conclusions of the summons, and stated and supported her grounds of defence. But I am, as matters stand, left to judge of her conduct from the statements of the pursuer, which, however, appear to be frank and apparently honest. I have carefully studied all the recent cases which bear on the points raised in this case, and have ultimately come to an opinion in favour of the pursuer, and, as the case will therefore not go further, I think it sufficient to express my opinion shortly.

"The pursuer and defender were married in 1869, when he was twenty-three and she twenty-one. In 1870 the pursuer was struck with paralysis. They lived together until the spring of 1878, when the defender deserted the pursuer, without, according to his account, any just reason. Her letters seem to indicate that she considered that she had reason to complain of his treatment of her. But she has not appeared in the cause to substantiate these reasons. He made several endeavours, extending over more than two years, to induce her to return, but met with nothing but refusals, expressed on the last occasion in a letter written by the defender's sister in peremptory and even coarse language. This was in November 1881, after which the pursuer seems to have lost sight of her until he learned that she had gone to America, and he had no communication with her until 4th November 1898, twenty years after her desertion, when he received a letter from her, which is, I think, a good deal to her credit. It is expressed in very friendly

terms, but it does not offer to resume cohabitation, and does not explain her long absence. The pursuer's response to the defender's advances was anything but cordial, and after some other letters and meetings she wrote the letter dated 7th August 1889, in which she concludes by saying—"I am still willing on my part to take up my conjugal duties as soon as you on your part agree to the same." He replied on 9th August 1889 in a letter which is not particularly satisfactory, and certainly is not an agreement to resume cohabitation. There were no more meetings or letters, and in April 1900 this action was raised.

"Had the case depended on these letters only I should have felt even greater difficulty than I entertain. But from the evidence it appears that when they met the pursuer asked the defender to explain what she had been doing during the twenty years of her absence—certainly a most legitimate inquiry for a husband to make—but that she seemed to take offence and would give no explanation; so that as the case is laid before me her offer to resume cohabitation was practically coupled with the condition that she was not to explain her behaviour and mode of life during her absence. If that was so, it was not, in my judgment, a reasonable offer of adherence, or an offer with which the pursuer was bound to be content or to accept. Again, I say that the case might have assumed quite a different complexion had the defender appeared and told her own story. But on the evidence as I have it that was the footing on which they parted.

"The pursuer was perfectly frank in his evidence. He said he was willing to receive his wife back if she informed him about her life during the twenty years of her absence, otherwise he was not; and that he wished a divorce in order to prevent her from succeeding to his money to which he had recently succeeded, and which he said he would rather leave to the Infirmary.

"In that state of the facts the question whether the pursuer is entitled to decree of divorce is attended with difficulty. If it depended on the old Act 1573, cap. 55, it is not very easy to see that it could have been granted. But, in my opinion, the alteration effected by the 11th section of the Conjugal Rights (Scotland) Amendment Act 1861, makes a material difference. On the other hand, I am not able to assent to what I understand to be the contention of the pursuer, that after so long an absence an offer to adhere comes too late—a contention supported by the cases of *Mair v. Mair*, July 19, 1879, 6 R. 1355, and *Winchcombe v. Winchcombe*, May 24, 1881, 8 R. 726. The authority of these cases is, however, greatly affected by the case of *Auld v. Auld*, October 31, 1884, 12 R. 36, and by many of the *dicta* in *Watson v. Watson*, March 20, 1890, 17 R. 736, and in *Mackenzie v. Mackenzie*, May 16, 1895, 22 R. (H.L.) 32; and I am disposed to think that it is never too late for the defender in an action of divorce for desertion to offer to adhere if the offer be sincere and be not accompanied

with unreasonable conditions. But if it be such an offer as the deserted spouse cannot reasonably be expected to accept, then it will not form a defence to an action of divorce otherwise well founded.

"I think it proved in this case that in 1878 the defender maliciously deserted her husband without reasonable cause, and continued in malicious desertion for twenty years, seeing that she has not appeared to put any other colour on her conduct. If the law requires (which I doubt) that the pursuer should call on her to resume cohabitation, then he did so at intervals for two years and a half; and when she offers to resume cohabitation without full explanations as to her absence, which I take her offer to have been, then I think that was not a reasonable offer with which any husband could be expected to be satisfied. It may have been the law that the pursuer of a divorce was to be held as at all times ready to adhere, but I am of opinion that that cannot be held to be the law since the Conjugal Rights (Scotland) Amendment Act was passed."

Decree of divorce was granted.

Counsel for Pursuer—M'Lennan. Agent—W. Patrick Crow.

Friday, June 8.

## SECOND DIVISION.

[Sheriff of Lanarkshire.

### DAY v. GLAISTER.

*Revenue—Stamp—Receipt—Memorandum Endorsed on Specification for Contract—Stamp Act 1891 (54 and 55 Vict. cap. 39), sec. 101—Payment—Proof of Payment.*

By the Stamp Act 1891, sec. 101, the expression "receipt" is declared to include "any note, memorandum, or writing whereby any money amounting to £2 or upwards . . . is acknowledged or expressed to have been received or deposited or paid."

D. and G. by joint adventure entered into a contract for the construction of certain waterworks. G. collected the instalments of the contract price, granting receipts to the employer, and accounted to D. for his share. The parties kept no business books, but the sums received by each were noted upon the specification for the contract. In an action by D. against G. for payment of £60, G. alleged in defence that he had paid this sum to D. Held that a memorandum endorsed on the specification and signed by D., "Received the sum of £60 st.," was not a receipt within the meaning of section 101, and therefore did not, under section 103, require to be stamped, and that it was competent evidence against D. that he had received payment of the £60 in dispute.

This was an action brought in the Sheriff Court at Lanark at the instance of William

Day against Andrew Glaister, concluding for payment of £81, 4s. 5d. The parties, who were both contractors carrying on business separately in Lanark, entered into a joint contract with the District Committee of the Upper Ward of Lanarkshire for the construction of certain waterworks at Kirkfieldbank. The sum sued for was the balance of the share which the pursuer alleged to be due to him in respect of the execution of the said contract, and which had been collected by the defender from the County Council. The defender admitted the pursuer's claim to the extent of £21, 4s. 5d., but averred that he had on 19th October 1897 paid him the balance of £60. This was denied by the pursuer. In a counter action at the instance of Glaister against Day with reference to another contract Glaister credited Day with the sum of £21, 4s. 5d., which he admitted to be due.

A proof was taken on 2nd November 1899. From the evidence it appeared that although the parties offered for the work jointly each did his separate portion. The defender had the larger interest, and generally collected the instalments of the contract price, thereafter paying over to the pursuer a sum which roughly represented the latter's share. Neither party kept any business books, and the only record of the transactions between them consisted of certain entries or memoranda made upon the back of the specification for the contract, of the sums received by each in respect of his share. Among these there was an entry in the following terms—"Received the sum of £60 st. to account on Kirkfieldbank Waterwork. Oct. 19th 1897. William Day and Sons." It was proved that on that date the defender collected an instalment of £100, and he founded, *inter alia*, upon this entry as instructing the payment by him to the pursuer of the £60 in dispute. Several similar notes, of date prior to the 19th October 1897, were made and signed by the parties, and with regard to these no question arose.

The pursuer deponed with regard to the entry of 19th October—"The third (*i.e.*, the entry in question) is not mine. I am not aware of signing it. It looks like my signature. I cannot point out any particular thing about the signature which causes me to say that it is not mine. The reason why I say it is not mine is that at that time I know I did not get any money from Glaister." The defender deponed—"I would not have paid Mr Day his share of the money without getting his acknowledgment for the money. I would not have been content with a note in my own handwriting that he had been paid. If instead of having it endorsed on the specification I had noted it in a book, although I had made an entry in my own writing in my cash-book, I would also have required a receipt from Mr Day. I suppose if I had got a receipt from Mr Day it would have been very much in the same terms as the indorsements on 7/1 of process."

It was contended on behalf of the pursuer that the entry of 19th October, being a receipt within the meaning of the Stamp Act, and being unstamped, could not be